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SONGSIL UDTOOM & ORS v. PP

COURT OF APPEAL, PUTRAJAYA

MOHTARUDIN BAKI JCA

TENGKU MAIMUN TUAN MAT JCA

AHMADI ASNAWI JCA

B

[CRIMINAL TRIALS NO: B-05-66, 67, 68 & 69-03-2012]

2 OCTOBER 2015

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CRIMINAL PROCEDURE: Charges – Defective charge – Charge under s. 57(1)(b) of Internal Security Act 1960 – Four appellants charged with joint possession of firearms and ammunition – Whether charge must be proven against each and every appellant – Whether appellants acting in concert – Whether in furtherance of common intention – Whether pre-arranged plan – Penal Code, s. 34

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CRIMINAL PROCEDURE: Appeal – Fact, finding of – Evaluation or findings as to defence – Failure by trial judge to evaluate defence – Whether violation of s. 182A of Criminal Procedure Code – Whether amounted to misdirection

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The four appellants were arrested when SP15 and his team raided room No 6104 Pyramid Tower Hotel. Upon investigation, the police recovered, amongst others, firearms and bullets and consequently, the appellants were charged for two charges under s. 57(1)(b) of the Internal Security Act 1960. At the conclusion of the trial, the judge found that the defence posited by the appellants were mere denials and that the appellants were in full control and custody of the room, where the firearms were found with the bullets, which was a security area. The appellants were thus convicted on both charges and sentenced to death. Hence, the appellants appealed on the grounds of, *inter alia*: (i) the absence of s. 34 of the Penal Code ('PC') in the charges, in that, the prosecution must prove the charges on each and every appellant and not just prove on one appellant and that there were also no evidence, either direct or corroborative, in terms of DNA findings, fingerprint impressions or CCTV recordings to link the firearms and bullets to each and every appellant; and (ii) the appellants' defence were not adequately considered.

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Held (allowing appeal; acquitting and discharging appellants)**Per Ahmadi Asnawi JCA delivering the judgment of the court:**

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(1) The two charges alluded to '... telah ada dalam milik kamu bersama ...' when literally translated meant that they were in joint possession of the same, a far cry from the essence of s. 34 of the PC where each of such person is liable for that act in the same manner as if the act is done by him alone. In such event it is imperative that the prosecution must prove the charges against each and every appellant. (para 22)

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(2) The prosecution had failed to prove that each and every appellant were in possession of the said firearms and bullets apart from showing that all the four appellants slept and were arrested in the same room where the

- firearms and bullets were recovered. The *factum* of sleeping together in the same room and got arrested together in the same room did not indicate which one of the four or that all the four of them had the care and management of the said room as there was no evidence that they were acting in concert with each other. (para 24) A
- (3) The prosecution had failed to prove exactly what part was taken or played by each of the four appellants. Additionally, the prosecution had failed to distinguish the individual acts of each of the appellants in the commission of the offence. There was also no evidence that they were acting in concert and since they were not charged in furtherance of common intention under s. 34 of the PC, it meant that none of the appellants would equally be liable for the act of any one of them as if the act (of unlawful possession) were done by him alone, notwithstanding that it was the other person who actually committed the offence. (para 25) B C
- (4) The existence of common intention is a question of fact and it may be proved by direct evidence or by way of inferences from the circumstances of the case or upon proved facts. Apart from the fact that the appellants were arrested together in the room, there was a dearth of evidence to link them with the commission of the crime in furtherance of the common intention. The court also did not find, either through direct evidence or by way of inferences from the circumstance of the case, that there was a pre-arranged plan to commit the criminal act of having unlawful possession of the firearms and bullets and that the act was done in concert to that pre-arranged plan. Further, there was no evidence to link the said firearms and bullets to the appellants. (paras 28, 29 & 34) D E F
- (5) It was apparent from the grounds of judgment delivered by the trial judge that there was no evaluation or findings as to the defence posited by the appellants. The failure by the judge to evaluate and consider the appellants' defence was a violation of s. 182A of the Criminal Procedure Code which provides that at the conclusion of the trial the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt. The failure of the judge in evaluating the defence amounted to a misdirection. (para 41) G

Bahasa Malaysia Headnotes H

Keempat-empat perayu telah ditangkap semasa SP15 dan pasukannya menyerbu bilik No 6104 Pyramid Tower Hotel. Selepas siasatan dijalankan, pihak polis menemui, antara lain, senjata api dan peluru dan oleh itu, perayu-perayu telah dipertuduh atas dua kesalahan di bawah s. 57(1)(b) Akta Keselamatan Dalam Negeri 1960. Di akhir perbicaraan, hakim mendapati bahawa pembelaan yang dikemukakan oleh perayu-perayu adalah penafian I

- A semata-mata dan bahawa perayu-perayu mempunyai kawalan dan milikan penuh bilik di mana senjata api ditemui dengan peluru, yang adalah kawasan keselamatan. Perayu-perayu oleh itu disabitkan atas kedua-dua pertuduhan dan dijatuhkan hukuman mati. Oleh itu, perayu-perayu merayu atas alasan-alasan, antara lain: (i) ketiadaan s. 34 Kanun Keseksaan ('Kanun') dalam
- B pertuduhan, di mana, pihak pendakwaan perlu membuktikan pertuduhan terhadap setiap seorang perayu dan bukan hanya membuktikannya atas seorang perayu dan juga bahawa tiada keterangan, sama ada langsung atau menyokong, berkaitan dapatan DNA, kesan cap jari atau rakaman CCTV untuk mengaitkan senjata api dan peluru dengan setiap seorang perayu; dan
- C (ii) pembelaan perayu-perayu tidak dipertimbangkan dengan secukupnya.

Diputuskan (membenarkan rayuan; melepaskan dan membebaskan perayu-perayu)

Oleh Ahmadi Asnawi HMR menyampaikan penghakiman mahkamah:

- D (1) Kedua-dua pertuduhan menyatakan '... telah ada dalam milik kamu bersama ...' apabila diterjemahkan secara literal membawa maksud bahawa mereka mempunyai milikan bersama, yang jauh berbeza daripada intipati s. 34 Kanun di mana setiap orang bertanggung bagi tindakan tersebut secara yang sama jika tindakan tersebut dilakukan olehnya seorang. Dalam keadaan tersebut adalah penting bahawa pihak
- E pendakwaan membuktikan pertuduhan terhadap setiap seorang perayu.
- F (2) Pihak pendakwaan telah gagal membuktikan bahawa setiap seorang perayu mempunyai milikan senjata api dan peluru dan hanya menunjukkan bahawa keempat-empat perayu tidur dan ditangkap dalam bilik yang sama di mana senjata api dan peluru ditemui. Fakta bahawa kesemua mereka tidur dalam bilik yang sama dan ditangkap bersama dalam bilik yang sama tidak menunjukkan yang mana satu daripada empat perayu atau keempat-empat mereka mempunyai jagaan dan pengurusan bilik tersebut kerana tiada keterangan bahawa mereka telah bertindak secara bersama antara satu sama lain.
- G (3) Pihak pendakwaan telah gagal membuktikan dengan jelas apakah peranan yang dimainkan oleh setiap seorang daripada keempat-empat perayu. Tambahan lagi, pihak pendakwaan telah gagal membezakan tindakan individu setiap seorang perayu dalam kesalahan yang dilakukan. Juga tiada keterangan mereka bertindak secara bersama dan
- H oleh sebab mereka tidak dipertuduh atas lanjutan niat bersama kesemua mereka di bawah s. 34 Kanun, ia bermaksud tiada seorang pun perayu yang bersama-sama bertanggung bagi tindakan salah seorang daripada mereka seperti tindakan itu (milikan salah) dilakukan olehnya seorang, walaupun orang lain yang sebenarnya melakukan kesalahan itu.
- I (4) Kewujudan niat bersama adalah persoalan fakta dan ia boleh dibuktikan oleh keterangan langsung atau dengan cara inferens daripada keadaan kes atau atas fakta yang dibuktikan. Selain daripada fakta bahawa perayu-

perayu ditangkap bersama dalam bilik, tidak ada keterangan untuk mengaitkan mereka dengan perbuatan jenayah sebagai lanjutan niat bersama. Mahkamah juga tidak mendapati, sama ada melalui keterangan langsung atau secara inferens daripada hal keadaan kes, bahawa terdapat pelan yang diatur terlebih awal untuk melakukan tindakan jenayah pemilikan salah senjata api dan peluru dan bahawa tindakan tersebut dilakukan secara bersama dengan pelan yang diatur terlebih dahulu. Selanjutnya, tiada keterangan untuk mengaitkan senjata api dan peluru tersebut dengan perayu-perayu.

- (5) Adalah jelas daripada alasan penghakiman yang dikemukakan oleh hakim bicara bahawa tiada penilaian atau dapatan mengenai pembelaan yang diketengahkan oleh perayu-perayu. Kegagalan hakim untuk menilai dan mempertimbangkan pembelaan perayu-perayu adalah percanggahan s. 182A Kanun Tatacara Jenayah yang memperuntukkan bahawa di akhir perbicaraan mahkamah perlu mempertimbangkan kesemua keterangan yang dikemukakan di hadapannya dan perlu menentukan sama ada pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Kegagalan hakim dalam menilai pembelaan merupakan satu salah arahan.

Case(s) referred to:

PP v. Aris Yunus [1989] 1 CLJ 239; [1989] 2 CLJ (Rep) 289 HC (*refd*)
R v. Abbott (1955) 2 All ER 899 (*refd*)

Legislation referred to:

Criminal Procedure Code, ss. 153, 182A(1), 422
 Penal Code, s. 34

For the 1st & 3rd appellants - M Visvanathan; M/s Saibullah V Nathan & Co
For the 2nd & 4th appellants - Sreekant Pillay; M/s Lim Sreekant Pillay & Co
For the respondent - Nahra Dollah (Iskandar Mohd with her); DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45-59-2007 & 45-60-2007 (overruled)]

Reported by S Barathi

JUDGMENT

Ahmadi Asnawi JCA:

- [1] In the court below, two charges were levelled against all the four appellants. The first charge reads:

Bahawa kamu semua pada 4 Februari 2007 jam lebih kurang 3.45 pagi di bilik No. 6104, Pyramid Tower Hotel, Bandar Sunway, Subang Jaya di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, iaitu satu kawasan keselamatan sepertimana yang diisytiharkan oleh Yang di Pertuan Agong mengikut Pengisytiharkan No. P.U.(A)148 bertarikh 15 Mei 1969 tanpa sebab yang sah telah ada dalam milik kamu bersama:

- A a. Sepucuk pistol Colt MK IV Siri 80, no. siri SS13023;
b. Sepucuk rifel AR 15, No. Siri 960442;
c. Sepucuk pistol Colt, No. Siri 111099;
d. Sepucuk pistol Remington Rand Inc;

- B e. Sepucuk pistol Sig Sauer No. Siri B33964; dan
f. Sepucuk pistol Glock, No. Siri GFH 122

tanpa apa-apa kuasa yang sah dan oleh yang demikian kamu melakukan satu kesalahan yang boleh dihukum di bawah seksyen 57(1)(a), Akta Keselamatan Dalam Negeri, 1960.

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The second charge reads:

Bahawa kamu semua pada 4 Februari 2007 jam lebih kurang 3.45 pagi di bilik No. 6104, Pyramid Tower Hotel, Bandar Sunway, Subang Jaya di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, iaitu satu kawasan keselamatan sepertimana yang diisytiharkan oleh Yang di

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Pertuan Agong mengikut Pengisytiharan No. P.U.(A)148 bertarikh 15 Mei 1969 tanpa sebab yang sah telah ada dalam milik kamu bersama sebanyak 336 butir peluru pelbagai jenis tanpa apa-apa kuasa yang sah dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 57(1)(b) Akta Keselamatan Dalam Negeri, 1960.

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[2] At the end of the trial, all the four appellants were convicted of both the charges and sentenced to death. Hence, these appeals before us against the said convictions and sentences.

The Case For The Prosecution

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[3] On 4 February 2007 at about 3.45am, acting upon information received, SP15 (Supt Azman bin Ayob) and his team raided room No. 6104, Pyramid Tower Hotel, Bandar Sunway, Subang Jaya. With the assistance of SP7 (Rosli bin Mohd Hassan) the assistant security manager of the hotel, they managed to neutralise the security lock of the door to the room. The door

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[4] SP9 (Insp Rajenderan a/l Y Kandiah) saw the third appellant rising from the sofa he was seated and tried to grab a pistol on the make-up table (table 'A' in sketch plan exh. P158). However, SP9 managed to subdue the third appellant with the assistance of a member of the team after a brief struggle.

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[5] Meanwhile, SP10 (D/Sjn Mejar Sukdarshan Singh) saw the first appellant trying to grab a pistol on a small table placed between the two beds in the room (table 'B' in same sketch plan). Nevertheless, he was also subdued and detained.

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[6] SP11 (D/Corp Malatambi a/l Vadivelu) managed to detain the second appellant while on bed and the fourth appellant was arrested by SP13 (D/Sjn Chong Teck Fatt). A

[7] Upon full investigation of the room, the police recovered:

- (i) one Glock pistol, bearing serial no. GFH122 on the table marked 'A' in the said sketch plan together with one long magazine containing 17 bullets and two short magazines containing 11 bullets each (marked exhs. P8B, P8C, P8D and P8E respectively). There were altogether 39 pieces of 9mm Luger .45 auto bullets; B
- (ii) one Colt pistol MK IV bearing serial no. SS13023 on the table marked 'B' in the same sketch plan together with one long magazine containing ten bullets and one short magazine containing eight bullets (marked P9B, P9C and P9D respectively). There were altogether 18 pieces 9mm bullets; C
- (iii) one black bag carrying the 'Bilabong' brand name containing, amongst others: D
 - (a) one dismantled Colt AR15 ritel with the serial no. 960442;
 - (b) one Remington Rand Inc pistol wherein its serial number has been erased together with an empty magazine; E
 - (c) one Colt pistol carrying the serial no. 111099 with an empty magazine; and
 - (d) a white 'Nike' sock containing 64 pieces of WW6RA, 106 pieces of Luger, ten pieces of ACP97 .45 auto, 28 pieces of RP .45 auto 96 and 23 pieces of PSP83 bullets; F
- (iv) one black bag with light blue stripes carrying the 'Honda' brand name containing amongst others, one Sig Sauer pistol bearing the serial number B111964 together with two magazines containing 13 pieces 9mm bullets; and G
- (v) there were at least five other bags seized from the room containing, amongst others clothes and jewelleryes.

Findings Of Trial Judge At End Of The Prosecution's Case

[8] The learned judge found that all the four appellants were in unlawful possession or custody of the Colt pistol marked P9B together with the magazine marked P9C containing ten pieces of .45 auto 96 bullets and the magazine marked P9D containing eight pieces of bullets (on the table marked 'B') and the Glock pistol marked P8B together with the magazine marked P8C containing 17 pieces of bullets and two other magazines containing 11 pieces of bullets each and marked P8D and P8E respectively (on the table H I

A marked 'A'). The learned judge also found that the location where the said firearms and bullets were found were within the security area as declared by DYMM Yang di Pertuan Agong *vide* PU(A)148 dated 15 May 1969.

[9] The learned judge concluded:

B Bagi pertuduhan pertama pihak pendakwaan telah berjaya mengemukakan kes *prima facie* terhadap kesemua OKT bagi kesalahan seperti mana dalam pertuduhan kerana memiliki:

a. Sepucuk pistol Colt MK IV Siri 80, nombor siri SS 13023;

b. Sepucuk pistol Glock, nombor siri GFH122.

C Bagi pertuduhan kedua pihak pendakwaan telah berjaya mengemukakan kes *prima facie* terhadap kesemua OKT bagi kesalahan tersebut kerana memiliki 39 butir peluru 9 mm Luger dan 18 butir peluru .45 Auto 96.

D Dengan itu mahkamah telah memanggil keempat-empat OKT untuk mengemukakan pembelaan mereka atas pertuduhan tersebut seperti di atas.

The Defence Case

E [10] All the four appellants shared a common defence. The first, second and fourth appellants are Thai nationals and came to Malaysia for a sightseeing tour together with three others namely Weeraphong, Somlit and Vinai. Their first destination was Kuala Terengganu where they met the third appellant there. Meanwhile, Somlit and the two others proceeded to Kuala Lumpur.

F [11] On 1 February 2007, they went to Kuala Lumpur and met Somlit at Mandarin Court Hotel and put the night at the said hotel. On 2 February 2007, all four of them and Somlit changed their hotel and put up at Hotel Armada. On 3 February 2007, all the four appellants again shifted their hotel and now stayed at Sunway Lagoon Hotel. In the evening, they shifted to Hotel Pyramid Tower and the room (No. 6104) was registered under the fourth appellant's name. Next, they went sightseeing and later met Somlit with three others at KFC Sunway.

H [12] Somlit told them that they wanted to put several bags in their hotel room. The third appellant gave one of the key cards of their room to Somlit who then left with the three others who came with him. Thereafter, all the four appellants went back to their hotel and retired to their room at about 12 midnight after spending time at the hotel's coffee-house.

I [13] The first appellant woke up when he was pulled down from the bed in the room and denied that he had tried to grab the pistol lying on table 'B', placed between the two beds.

[14] The second appellant stated that the police placed the pistol on the tables in the room. The three other appellants also said that the police took the pistols from the bags and placed them on the tables.

[15] The third appellant denied that he had tried to grab the pistol placed on table 'A'. He passed out when he was hit on his head and regained consciousness only at the hospital. He denied signing the search list (exh. P241) prepared by SP15 as at the material time he was alleged to have signed the same, he was already warded in the hospital.

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[16] The fourth appellant said that the said room was registered in her name. However, under cross-examination she admitted that the bill was paid by the third appellant as according to the third appellant, foreigners may be offered a discount.

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[17] All the four appellants denied having knowledge of the firearms and bullets found in the room. They also contended that some of the bags found in the room did not belong to them.

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Finding Of The Trial Judge At The End Of The Defence Case

[18] At the conclusion of the trial, the learned judge found that the defence posited by the appellants were mere denials. They were in full control and custody of the said room where the two firearms were found with the bullets. All the four appellants were arrested in the said room.

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[19] She found that all four appellants were having unlawful custody and possession of the said two firearms and bullets and the location where the same were found were in a security area. The defence failed to raise any reasonable doubt upon the prosecution's case and concluded:

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Menimbang keterangan secara keseluruhannya daripada awal ke akhir kes didapati pihak pendakwaan berjaya membuktikan kesalahan (guilt) kesemua OKT tanpa keraguan yang munasabah. Tiada keraguan yang munasabah tentang pemilikan dan pengawalan oleh kesemua OKT ke atas pistol-pistol dan peluru-peluru seperti yang tersebut dalam pertuduhan-pertuduhan yang mana pembelaan dipanggil dalam kes ini. Sehubungan dengan itu OKT 1, 2, 3 dan 4 didapati bersalah dan disabitkan atas kesalahan-kesalahan bagi pertuduhan pertama memiliki:

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a. Sepucuk pistol Colt MK IV Siri 80, nombor siri SS13023;

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b. Sepucuk pistol Glock, nombor siri GFH 122

dan pertuduhan kedua kerana memiliki 39 butir peluru 9 mm Luger dan 18 butir peluru .45 Auto 90.

The Appeal

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[20] The appeals before us could broadly be grounded upon two grounds:

- (i) the absence of s. 34 of the Penal Code (PC) in the charges; and
- (ii) the appellants defence were not adequately considered.

I

A **The Absence Of S. 34 Of The Penal Code In The Charges**

[21] Learned counsels submitted that the absence of s. 34 of the Penal Code (PC) in the charges against the appellants means that the prosecution must prove the charges on each and every appellant and not just prove on one appellant. There was also no evidence either direct or corroborative in terms
B of DNA findings, fingerprint impressions or CCTV recordings to link the firearms and bullets to each and every appellant.

[22] We were with the aforesaid submissions. The two charges alluded to "... telah ada dalam milik kamu bersama ...". Literally translated it means they were in joint possession of the same, a far cry from the essence of s. 34
C of the PC where each of such person is liable for that act in the same manner as if the act is done by him alone. Hence, in such event it is imperative that the prosecution must prove the charges against each and every appellant.

[23] Our attention was drawn to the case of *R v. Abbott* (1955) 2 All ER 899 which was referred to in *PP v. Aris Yunus* [1989] 1 CLJ 239; [1989] 2 CLJ (Rep) 289 which we found to be on all fours with the issue presently
D before us. The relevant passage is worth reproducing:

The distinction is that in this case there were two persons in the house and there is no evidence as to which one of the two or both had the care or management of the premises. I drew the attention of the learned DPP
E to the case of *R v. Abbott* (1955) 2 All ER 899 especially that part of the judgment as p. 901 which reads:

If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the Jury ought to return a verdict of not guilty against both because the
F prosecution have not proved the case. If in those circumstances it were left to the defendants to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty. Pinnemore J remembers a case in which two sisters were
G indicted for murder and there was evidence that they had both been in the room at the time when the murder of the boy was committed: but the prosecution could not show that sister A had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was
H no evidence which and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove the case.

[24] Having perused through the evidence, we were again with learned counsels that the prosecution has failed to prove that each and every
I appellant were in possession of the said firearms and bullets apart from showing that all the four appellants slept and were arrested in the same room where the firearms and bullets were recovered. However, we opined that the

factum of sleeping together in the same room and got arrested together in the same room does not indicate which one of the four or that all the four of them had the care and management of the said room as there is no evidence that they were acting in concert with each other.

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[25] The Glock pistol (exh. P8B) was said to have been recovered from table 'A' and the Colt pistol (exh. P9B) was recovered from table 'B' and the four other firearms were recovered from the 'Bilabong' bag. But the prosecution could not and has failed to show who had committed the offence in respect of each of the firearms. Very likely one or the other three or any one of the four or all four of them must have possession of the said firearms but there was no evidence as to which one of the four or that all the four appellants had possession of each of the same. The prosecution failed to prove exactly what part was taken or played by each of the four appellants. Additionally, the prosecution failed to distinguish the individual acts of each of the appellants in the commission of the offence. Equally there is no evidence that they were acting in concert and since they were not charged in furtherance of the common intention of all under s. 34 of the PC, it means that none of the appellants would equally be liable for the act of any one of them as if the act (of unlawful possession) were done by him alone, notwithstanding that it was the other person(s) who actually committed the offence. The same is equally true in respect of the possession of the bullets recovered from the same room.

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[26] The learned Deputy Public Prosecutor (DPP) implored upon us that the wording "telah ada dalam milikan kamu" gave the appellants sufficient notice that they were charged for having joint possession of the said firearms and bullets. The absence of the word "s. 34" in the charges does not make the charges defective. It is merely an irregularity under s. 153 of the Criminal Procedure Code and is curable under s. 422 of the same. It is neither a substantive evidence but only a rule of evidence.

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[27] The learned DPP went on to submit that on the evidence as adduced, the prosecution had indeed proven that the appellants have joint possession of the said firearms and bullets in furtherance of the common intention of them all, notwithstanding the absence of s. 34 of the PC.

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[28] The existence of common intention is a question of fact and it may be proved by direct evidence or by way of inferences from the circumstances of the case or upon proved facts. Having perused the evidence, we opined that the evidence does not support the existence of common intention of them all to commit the offence. Apart from the fact that the appellants were arrested together in the said room, there is a dearth of evidence to link them with the commission of the crime in furtherance of the common intention. The prosecution failed to establish that the appellants have some knowledge that an act may be committed which is consistent with the furtherance of the common intention or would be in furtherance of the common intention.

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- A [29] The prosecution must also establish that there was a pre-arranged plan to commit the criminal act of having unlawful possession of the firearms and bullets and the said act was done in concert to that pre-arranged plan. Such planning could develop on the spot or in the course of the commission of the offence. However, we found none of these either through direct evidence or
- B by way of inferences from the circumstances of the case. Being together in the same room without more can hardly be said to constitute a pre-arranged plan.

Evidence To Link The Four Appellants With The Firearms And Bullets/ Ammunition

- C [30] We further found that there is no evidence to link the firearms (in first charge) and bullets (in second charge) to any of the appellants.

[31] Finger print impressions were not lifted from the firearms recovered from the Bilabong bag and the pistols recovered from table 'A' and table 'B'.

- D [32] No DNA investigation was done to link the firearms in the Bilabong bag and the pistols to the appellants. The chemist report (at p. 1003 Vol. 8 ROA) was silent in respect of this investigation. Interestingly the chemist report reveals that the DNA of other persons were found on other articles.

- E [33] SP12, the security manager of the hotel testified that every floor of the hotel has a CCTV camera and the recordings would be preserved for at least two weeks. However, the I.O did not ask from SP12 the CCTV recording for the sixth floor where room No. 6104 was located. If the CCTV recordings were investigated it may show which appellant had carried/in possession of which bag in particular the Bilabong bag which contained at least four
- F firearms and the bullets. It would also show the truth or falsity of the appellants' claim that Somlit and his friends had also deposited several bags in the said room. This would settle once and for all the issue whether the bags, its contents and the firearms and bullets found therein belonged to the appellants. Additionally, the photographs extracted in the lift do not show
- G any of the appellants carrying any bag that resembles the Billabong bag containing the firearms.

- [34] The issues enumerated above were not addressed by the learned judge. Had she done so, she would have found that there is no evidence to link the said firearms and bullets to the appellants apart from the fact that they were
- H caught sleeping together in the said room.

The Two Pistols And 57 Bullets In The Findings Of The Learned Judge

- [35] The first charge alluded to six firearms of various types and the second charge referred to 336 pieces of bullets, also of various types. But the learned
- I judge found all the four appellants guilty of having unlawful possession only in respect of two pistols (exh. P8B and P9B). She made no finding at all

regarding the four other firearms when pronouncing her *prima facie* findings and also when convicting the four appellants at the end of the defence case. The same is true in respect of the second charge wherein she found all the four appellants guilty of having unlawful possession of 39 pieces of 9mm bullets and 18 pieces of .45 Auto 90 bullets when the charge alluded to 336 bullets of various types. No consequential amendments to the charges were instituted by the learned judge though to reflect her findings. This alone is most prejudicial to the defence.

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[36] Thus, it begs the question as to the remaining four other firearms and bullets. The learned judge failed to address this issue. If the learned judge was of the view that there is no evidence to link the four appellants with the four other firearms and the remaining bullets, then what is the basis of her findings of unlawful possession in respect of the two pistols (exhs. P8B and P9B) and the 57 bullets (39 + 18) given that the circumstances under which all the firearms and bullets were recovered were the same.

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[37] We opined that at the highest what has been proven were mere proximity of the incriminating exhibits with the four appellants. Mere proximity in the absence of compelling, incriminating evidence does not amount to possession. The evidence as it were, does not disclose any link of any of the firearms or the bullets to any of the appellants, including the two pistols and bullets alluded to by the learned judge in her findings.

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None Consideration Of The Appellants' Defence

[38] The defence posited that they came to Malaysia with Somlit and three others. They went separate ways and somewhere in between they reunited. In late afternoon on 3 February 2007, they met Somlit with three others at KFC Sunway wherein Somlit told them that they wanted to put several bags in their hotel room. The third appellant then gave one of the key cards of their room to Somlit who then left the scene with his friends. They claimed that some of the bags and the bag containing the firearms and bullets were not theirs but Somlit's. The pistols on the tables were in the said bag and the police took it out and placed the same on the tables.

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[39] It is apparent that in her grounds of judgement, the learned judge did not touch this aspect of the defence at all. There was no evaluation and equally she did not make any findings whether Somlit and his friends were real or otherwise and if Somlit and his friends do exist, the role played by them.

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[40] The learned judge also did not consider that no fingerprint impressions were lifted from the firearms and the bullets. The learned judge also did not take into account that no DNA investigation was done on the firearms. Equally not considered was the fact there were CCTV recordings on each of the hotel floor and these CCTV recordings, in particular on the sixth floor,

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A were never investigated by the I.O of the case. The learned judge also did not consider that two key cards of the room were issued to the third appellant but only one key card was recovered and tendered in court, giving credence to the third appellant's testimony that he gave one of the cards to Somlit.

B [41] In our view, the failure by the learned judge to evaluate and consider the above said issues posited by the defence is a violation of s. 182A(1) of the Criminal Procedure Code which provides that at the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt. Clearly the learned judge failed to conduct this exercise in her decision to
C convict all the four appellants. This failure amounted to a misdirection.

Conclusion

D [42] For all the reasons enumerated above, we opined that the convictions against all the four appellants were unsafe. Hence, we allowed their appeals. We set aside their convictions and sentences and ordered them to be acquitted and discharged forthwith.

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